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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 708

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, &c.,
Petitioners,

v.

C. J. MONTAG & SONS, INC., HOLMAN ERECTION COMPANY, INC., CURTIS CONSTRUCTION CO., *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
A. The basic dispute between the parties, and the work stoppages resulting therefrom	4
B. Settlement of the dispute; failure of Montag to comply with the arbitration award	6
C. The ruling below	9
Reasons for Granting the Writ	11
Conclusion	16
Appendix A—Opinion below	A1
Appendix B—(1) Judgment below	A14
(2) Order denying rehearing	A15
Appendix C—Statutes involved	A16

AUTHORITIES

CASES:

Judicial Decisions:

American Newspaper Publishers Ass'n v. *Labor Board*, 345 U.S. 100	15
Bedford Cut Stone Co. v. *Stone Cutters Ass'n*, 274 U.S. 37	11
Cammarano v. *United States*, 358 U.S. 498	13
Duplex Printing Co. v. *Deering*, 254 U.S. 443	11
International Longshoremen's Union v. *Juneau Spruce Corp.*, 342 U.S. 237	13
Labor Board v. *Gamble Enterprises*, 345 U.S. 117	15
Labor Board v. *Radio Engineers*, 364 U.S. 573	10, 12, 13, 15
Steelworkers v. *Enterprise Corp.*, 363 U.S. 593	11, 14
United States v. *Aluminum Co. of America*, 148 F. 2d 416	13

Page

National Labor Relations Board Rulings:

Brotherhood of Teamsters, etc., Local 70, 136 NLRB 1086 12
Highway Truckdrivers & Helpers, Local 107, 134 NLRB 1320 12
International Brotherhood of Electrical Workers, Local 292, 126 NLRB 1212 12
Sheet Metal Workers Int'l Assn., Local 272, 136 NLRB 1402 12
Typographical Union, 145 NLRB No. 95, LRRM 1079 12
Wood, Wire & Metal Lathers Int'l Union, Local 328, 139 NLRB 598 12

STATUTES:

Labor Management Relations Act, 1947:

§301(a) 4, 8, 14
§303(a), as amended in 1959 .....13, 16
§303(a)(4) 2, 3, 9, 13, 16
§303(b) 2, 3, 15

National Labor Relations Act:

§8(b)(4)(D) 12, 13, A16
§8(b)(4)(D), as amended in 1959 .....13, A16
§8(b)(6) 15, 16, A16
§8(b)(6), as amended in 1959 ..... A16
§10(k) 10, 12, 13, 15, A17
29 U.S.C. §158(b)(4)(D) A16
29 U.S.C. §158(b)(6) A16
29 U.S.C. §160(k) A17
29 U.S.C. §185(a) A18
29 U.S.C. §187(a) A19
29 U.S.C. §187(a)(4) A18
29 U.S.C. §187(b) A19

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INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, &c., your petitioners, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cases on July 14, 1964.

OPINIONS BELOW

The memorandum opinion of the district court (MR 38-49)[1] is not reported. The opinion of the court below (Appendix A, *infra*, pp. A1-A13) is reported at 335 F. 2d 216.

JURISDICTION

The judgments of the court below (Appendix B(1), *infra*, p. A14) were entered on July 14, 1964. A timely petition for rehearing in banc was denied on August 31, 1964 (Appendix B(2), *infra*, p. A15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether work stoppages arising out of a demand by a union that an employer assign to its members particular work already assigned to members of another union will support a judgment for damages under §§ 303(a)(4) and (b) of the Labor Management relations Act, 1947, in respect of any period after the two unions were no longer competing for the particular work but had agreed that it should be reassigned to members of the first union.

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[1] The record as transmitted here consists of twelve volumes plus exhibits. The first volume contains the consolidated proceedings in the court below. The second has the pleadings and other court papers in the case brought by C. J. Montag & Sons, Inc., and its joint venturers, No. 1274 in the district court and No. 18875 below; it will be cited as "MR". The third, containing the pleadings, etc., in the case brought by Holman Erection Company, Inc., No. 1279 in the district court and No. 18876 below, will be cited as "HR"; while the fourth, with the pleadings, etc., in the Curtis Construction Co. case, No. 1288 in the district court and No. 18877 below, will similarly be cited as "CR".

The remaining eight volumes contain 1211 pages of transcript, numbered consecutively; they will be cited simply as "Tr."

The only exhibits relevant to the issues raised by this petition are those in the Montag case, and all exhibit references herein are accordingly restricted to those introduced in that proceeding.

2. Whether, where a union's contentions regarding assignment of work as between its members and those of another union are submitted at the employer's request to arbitration binding on all parties, pursuant to the first union's contract with the employer, the employer's refusal to comply with the arbitrators' award does not constitute a breach of contract because a United States Court of Appeals would have made a different award had it been arbitrating the dispute, or because that court would have set aside the award had it been made by the National Labor Relations Board in a proceeding under Section 10(k) of the National Labor Relations Act.

STATUTES INVOLVED

The statutes involved are set forth in Appendix C, *infra*, pp. A16-A19.

STATEMENT

These were three actions brought under §§ 303(a)(4) and 303(b) of the Labor Management Relations Act, 1947 (*infra*, pp. A18-A19), severally seeking damages by reason of an alleged jurisdictional strike; they were tried together in the district court, and were argued and decided together in the court of appeals.

The first one was brought by C. J. Montag & Sons, Inc., and three of its joint venture corporate associates (all hereinafter collectively referred to as "Montag"), against the International Brotherhood of Carpenters and Joiners of America, and Local 1849 of the same union (hereinafter "International" and "Local 1849" respectively, or collectively, "the Carpenters").[2] The defendants counter-

[2] Washington State Council of Carpenters and Columbia River Valley District Council of Carpenters, also made defendants originally, were dismissed from this action and from the two others without prejudice (MR 27, ¶2; HR 16, ¶2; CR 18, ¶2).

claimed under § 301(a) of the Labor Management Relations Act, 1947 (*infra*, p. A18), asserting a breach of contract on Montag's part. The district court found that Montag was damaged in the amount of $204,527.55 in consequence of the work stoppages (Fdg. 5, MR 70-71), held that Montag's breach of contract entitled the Carpenters to $40,000 by way of mitigation of damages (Conc. 2, MR 71, 82-83), and entered judgment in Montag's favor for the difference, viz., $164,527.55 (Conc. 3, MR 71-72; MR 73-74).

The second and third actions, brought by two of Montag's subcontractors, Holman Erection Company, Inc., and Curtis Construction Co. (hereinafter "Holman" and "Curtis," respectively), did not involve any counterclaims; they resulted in judgments in the respective sums of $10,000 (HR 38-39) and $42,877.92 (CR 46-47).

On cross-appeals by the Carpenters and Montag, the court below disallowed the $40,000 set-off in the Carpenters' favor, and in all other respects affirmed the judgments against the Carpenters.

The details of the case, insofar as they bear on the issues now presented, follow.

A. The Basic Dispute Between the Parties, and the Work Stoppages Resulting Therefrom.

In 1957, Montag as principal contractor and Holman and Curtis as subcontractors were engaged in constructing for the United States the Ice Harbor Dam on the Snake River near Pasco, Washington. Local 1849 had a collective bargaining agreement with Montag covering the carpenter work [Ex. 1], and other unions had similar contracts in respect of their trades. (Appendix A, *infra*, pp. A2-A3.)

Shortly after the commencement of work on the project in January 1957, there began a continuing controversy between Montag and Local 1849 as to whether and to what

extent the "rigging" of certain forms which were to be used in the pouring of concrete on the dam should be done by carpenters or by members of other craft unions (p. A3, *infra*). It is agreed that at no time material to the controversy was there ever an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing "rigging" work on the Ice Harbor Dam Project (Fdg 6, MR 57, HR 25, CR 27).

To quote from the opinion below (p. A3, *infra*), "some of the forms on the project were metal and some were wood. They were fabricated at certain locations on the project, carried to places where cranes were placed, and then were lifted by the cranes to the places where they were to be set up and used to contain the concrete as it was poured. The process of 'rigging' was the 'hooking on' of the fabricated forms to the cranes, the signaling to the operator of the crane that the forms were safely attached and, at the place where the crane was to deposit the forms, the unhooking of the forms from the crane and the signaling to the crane operator that that had been done. Both metal and wooden pieces of forms as well as other materials and tools might be attached to the same load."

In April 1957, Montag assigned the work of rigging the forms to the members of Iron Workers Local 14, in consequence of replies to inquires addressed by Montag to contractors at other major dam projects in the Pacific Northwest. Such inquiries were made on Montag's construction of the "procedural rules and regulations of the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry [Ex. 3]." (Fdgs. 8 and 9, MR 57-58, HR 25-26, CR 27-28.)

The Carpenters urged that the rigging work belonged to them under the collective bargaining agreement covering Eastern Washinton and Northern Idaho to which Montag and the Carpenters were parties [Ex. 1]; that the same

"procedural rules and regulations of the National Joint Board" called for the area practice [Ex. 3, p. 4, ¶(b)]; and that the area practice in this instance was for the rigging of forms to be handled by members of the Carpenters (Fdg. 9, MR 58, HR 26, CR 27-28).

Once more to quote from the opinion below (*infra*, p. A4), "• • • Montag having refused to accede to this demand, Local 1849 caused its members to refuse to work on or handle wooden forms after they had been rigged by the iron workers. This refusal, which began on June 6, 1957, closed down the project, since concrete could not be poured unless forms were placed to contain it. Several hundred carpenters struck, and other workmen on the project were rendered idle. The purpose of the strike was to compel Montag to assign to the carpenters the rigging of the wooden forms. This strike continued until June 22. Montag did not change the assignment of the rigging work.

"Again on September 19, 1957, Local 1849 caused a stoppage of the project for the same purpose. The stoppage continued until September 26, but did not achieve its objective."

B. Settlement of the Dispute; Failure of Montag to Comply With the Arbitration Award.

The district court made no findings of fact regarding what on petitioners' view is a vital issue herein, viz., whether and for how long there was in fact an active dispute between the Carpenters and the Iron Workers. What follows below is drawn from the record.

Montag "had bid the job based on rigging the job by the use of Iron Workers" (Tr. 151), and disregarded the Carpenters' submission of letters from over 50 contractors establishing that the area practice was to assign all of that work to the Carpenters (Tr. 29, 50-51).

After the June stoppage started, international representatives of both unions went to the site, conferred, and reached an agreement on June 20, under which the Iron Workers relinquished their claims to at least a substantial portion of the work in question (Ex. 5 (Hiller), p. 34; Ex. 7 (Holland), pp. 23-24, 32; Ex. 8 (Pickel), 14; Ex. 11, p. 29; Ex. 38). The evidence indicates that the Iron Workers conceded to the Carpenters (Ex. 7, p. 29-30; Ex. 9 (Mitchell), p. 15; Ex. 35), but is in conflict as to whether that concession covered every issue in dispute (Ex. 5, pp. 34-35; Ex. 7, p. 28; Ex. 8, p. 14; Tr. 117). In any event, Montag refused to put the agreement into effect (Ex. 7, pp. 29-30), in part because it had bid on the job based on rigging being done by the Iron Workers (Tr. 151), in part on the ground that the agreement (Ex. 38) was not signed by the international presidents of the two unions (Tr. 94).

Agreement at the higher level was reached late in August (Ex. 5, pp. 40-41); to no avail; the contractor refused to comply (Ex. 5, pp. 36-39, 55; Ex. 7, pp. 33-35, 38-40; Tr. 148-151, 155-156); and it was this non-compliance with the August agreement that was directly responsible for the second or September stoppage (*infra*, pp. A7, A10), which was halted by the intervention of the Carpenters' General President (*ibid.*).

Montag then filed a protest with the National Joint Board for the Settlement of Jurisdictional Disputes (p. A7, *infra*), pursuant to the terms of its collective bargaining agreement with the Carpenters that specifically provided that "In the event of conflicting jurisdictional claims, the procedure of [that body, hereinafter "Joint Board"] shall govern" (*infra*, p. A10; Ex. 1 p. 12, Art. X § 2).

The Joint Board had been jointly established in May 1948 by labor and management in the construction industry to resolve and adjust jurisdictional disputes (Ex.

9, p. 4). It is composed of eight voting members, four representing building unions and four representing construction management (Ex. 9, pp. 17-18), and it deals not only with disputes in which the employer is neutral, but also with those in which the employer has made a work assignment that he seeks to have upheld (Ex. 9, p. 9).

On November 27, the Joint Board, duly including 4 management representatives (Ex. 9, p. 24; cf. *id.*, p. 17), made the following decision (*infra*, p. A10):

> "The hooking on, handling and signalling of all wood forms shall be assigned to carpenters. In other respects there is no basis to change the contractor's assignment. However, when not working on hooking on, handling and signalling operations the trade shall proceed with other work as assigned by contractor."

At the time that the foregoing decision was rendered, Montag had assigned to the Iron Workers all rigging work on multipurpose cranes, including the rigging of wooden forms; it refused to put the Board decision into effect; and it never did make any change in its work assignment (Fdg. 15, MR 59), even though two management members of the Joint Board, who "had been on the job and had viewed the physical thing and explained in some detail how the work was being handled * * * stated they believed that compliance could be effected with the Board's decission" (Ex. 9, p. 56).

Montag's continued refusal was the basis for the Carpenters' counterclaim under § 301(a) (*infra*, p. A18), which alleged breach of contract on Montag's part (MR 11-14) The portion of the Carpenters' contract with Montag making the procedure of the Joint Board applicable has already been quoted, *supra*, page 7; that procedure in turn provided (Ex. 3, p. 12) that "The affected Unions and Contractors shall promptly comply with each job decision of the Joint Board." It is common ground between the

parties that the Iron Workers equally with the Carpenters were bound by Joint Board decisions.

The district court concluded that Montag's failure to put the National Joint Board's decision into effect constituted a breach of the collective bargaining agreement to which Montag and the Carpenters were parties (Conc. 1, MR 71), but held that such breach entitled the Carpenters only to nominal damages, adding however that "it is equitable that [Montag's] damages should be reduced by the sum of $40,000 as mitigation or offset because of said breach of contract" (Conc. 2, MR 71). Following motions by both sides for amendments and additions, etc. (MR. 75-81), the district court amended the last quoted conclusion to read (MR 82-83):

> "Viewing [the Carpenters'] cross-complaint as an independent cause of action, [they] are not entitled to recover other than nominal damages from [Montag] as a result of said breach. However, considering the nature of this litigation and all of the surrounding circumstances of this case and the equities of the situation, it is proper that [Montag's] damages should be reduced by the sum of $40,000.00, which I find to be a reasonable amount in mitigation of damages."

The Carpenters appealed from all three judgments against them (MR 84; HR 40; CR 54), while Montag cross-appealed (MR 85-86), challenging both the basic measure of damages awarded as well as the foregoing set-off.

C. The Ruling Below.

The court of appeals sustained the judgments in favor of the several contractor plaintiffs in the amounts rendered, but reversed the set-off against Montag. Its holdings insofar as relevant to the questions presented by this petition may be summarized as follows:

1. The court did not pass on the contentions of the Carpenters that § 303(a)(4) (*infra*, pp. A18-A19) was

intended only to apply to such jurisdictional disputes as involved an active controversy between two unions, nor on Montag's view that it must be read literally. Instead, it supported Montag's alternative argument that in this case there was in fact an active dispute between the Carpenters and the Iron Workers (*infra*, pp. A4-A6), saying (pp. A8-A9):

> "The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union uses the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional disputes."

2. As to the counterclaim of the Carpenters based on Montag's refusal to comply with the decision of the National Joint Board, the court below said (*infra*, p. A11) that "its decision is beyond understanding" on the ground that it involved featherbedding. The court went on to say that if the case had gone to the National Labor Relations Board in a proceeding under Section 10(k) (*infra*, pp. A17-A18), and the Labor Board "had made a decision such as the Joint Board made in the case," it would have been the duty of the reviewing court to remand the matter to the Labor Board under the ruling in *Labor Board* v. *Radio Engineers*, 364 U.S. 573.

The court below further said (*infra*, p. A12) that "We think that a fair interpretation of the agreement of the Carpenters and the contractors, in the light of its undoubted purpose, was that the Joint Board was authorized to *decide* the jurisdictional dispute, and was not authorized to straddle it and leave the whole purpose of the agree-

ment unfulfilled," and accordingly concluded that Montag did not breach its agreement with the Carpenters. It therefore held the $40,000 reduction erroneous, and remanded the case for further proceedings (*infra*, p. A13), proceedings that are in fact purely ministerial and require only changes in the amount of damages recoverable under the Montag and Holman judgments.

REASONS FOR GRANTING THE WRIT

This case involves a ruling doubly weighted against the petitioner labor organizations. First, the court below held the Carpenters liable for damages in respect of those portions of their work stoppage that were occasioned by Montag's refusal to effectuate their agreement with the Iron Workers over the assignment of the "rigging" work. Simultaneously, the court below held that when Montag invoked the Joint Board's arbitration to which it had bound itself in advance by solemn contract, but then refused to comply with the Joint Board's decision, it was nonetheless not guilty of a breach of contract.

Not only does the unfairness of this combined result recall the most indefensible labor decisions of the Nineteen Twenties (e.g., *Duplex Printing Co.* v. *Deering*, 254 U.S. 443; *Bedford Cut Stone Co.* v. *Stone Cutters Ass'n*, 274 U.S. 37), but the court below, by applying a standard for judging jurisdictional strikes at variance with that consistently formulated by the National Labor Relations Board, and by injecting its own concepts into the Joint Board's arbitral award in disregard of this Court's ruling in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, that the merits of an arbitration award under a collective bargaining agreement are not subject to judicial revision, has in respect of both conflicts rendered a decision that literally cries out for review and correction here.

First. This case is not one where the employer concerned was (*infra*, p. A4) "the helpless victim over whose

prostrate body the battle was being fought;" to the contrary, Montag here was never neutral, and indeed stubbornly insisted on never altering the work assignment for the "rigging" that underlay its bid on the job (Tr. 151), even long after both unions concerned had arrived at an agreement govering the assignment of that originally disputed work.

In holding that, on such a state of facts, the employer could recover damages under § 303(a)(4) (*infra*, pp. A18-A19) for the period after both unions concerned had reached agreement, the court below clearly erred; for a consistent line of Labor Board rulings, all of them rendered subsequent to this Court's decision in *Labor Board* v. *Radio Engineers*, 364 U.S. 573, holds that there is no jurisdictional dispute within the meaning of § 8(b)(4)(D) and § 10(k) (*infra*, pp. A16-A17, A17-A18) in the absence of conflicting claims between competing unions. *Typographical Union*, 145 NLRB No. 95, 55 LRRM 1079; *Wood, Wire & Metal Lathers Int'l Union, Local 328*, 139 NLRB 598; *Sheet Metal Workers Int'l Assn., Local 272*, 136 NLRB 1402 (rival locals of same union); *Brotherhood of Teamsters, etc., Local 70*, 136 NLRB 1086 (same); *Highway Truckdrivers & Helpers, Local 107*, 134 NLRB 1320; *International Brotherhood of Electrical Workers, Local 292*, 126 NLRB 1212. Under those rulings, the circumstances relied on by the court below (*infra*, p. A6)—"The Iron Workers, therefore, had no occasion to complain or to strike about the assignment. They had the jobs"—is quite immaterial. What is alone material under the Labor Board's test is that, once the Iron Workers conceded to the Carpenters, there was no further jurisdictional strike.

It is true, as we have pointed out (*supra*, pp. 6-7), that the evidence regarding the extent of the Iron Workers' original concession is in conflict, nor was it resolved by any finding made by the trier of facts. But it is quite undis-

puted that, by end of August, the Iron Workers had made full concession at the highest level. And it is further undisputed that the September stoppage was a consequence, not of any quarrel between the Carpenters and the Iron Workers, because all disagreement among those two had been resolved, but only of a dispute between the Carpenters and Montag based on the circumstance that the latter obdurately refused to effectuate the agreement reached by the Carpenters and the Iron Workers.

The language of § 8(b)(4)(D) as it stood in 1957 when the stoppages now in question took place (*infra*, p. A16) is repeated verbatim in what at that time was § 303(a)(4) (*infra*, pp. A18-A19); surely, then, conduct that is legally insufficient to sustain before the Labor Board a charge of unfair practices under § 8(b)(4)(D) cannot support an action for damages under § 303(a)(4). This conclusion, that the substantive meaning of §§ 8(b)(4)(D) and 303 (a)(4) was the same, is strengthened by the "cross light" thrown on the problem by the later 1959 amendments (L. Hand, J., in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (C.A. 2); cf. *Cammarano* v. *United States*, 358 U.S. 498, 510), whereby § 303(a) (*infra*, p. A19) now simply incorporates § 8(b)(4) by reference.

Of course the remedies severally available under § 8(b) (4)(D), under § 10(k), and under § 303(a)(4) are not mutually exclusive (*International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237), nor need there be "substantive symmetry" between the several approaches to the same jurisdictional strike problem (*Labor Board* v. *Radio Engineers*, 364 U.S. 573, 585). But surely, regardless of what remedy is invoked, the nature of the conduct that Congress has proscribed remains identical. There are three remedies—but the conduct at which all of them are directed, and which Congress has declared illegal, must be the same whatever the remedy invoked.

The conclusion reached below, that the Carpenters were guilty of improper conduct, rests on a standard wholly different from that consistently formulated by the Labor Board in identical situations. The problem is a recurring one, and it is obviously important that this Court lay down a uniform rule for ascertaining the propriety or impropriety of particular union action.

Second. Not content merely with differing with the Labor Board on a matter still to be decided here, the court below went on to disagree with this Court on another issue. As we have shown, Montag invoked the arbitral machinery of the Joint Board's procedure, but then refused ever to comply with that body's award although bound to do so by the terms of its collective bargaining agreement with the Carpenters. Yet the court below refused to deem such noncompliance with the Joint Board's decision a breach of contract on Montag's part for which it would be liable in damages under § 301(a) (*infra*, p. A18), because, forsooth, the court below considered (*infra*, p. A11) that the Joint Board's decision "is beyond understanding."

On that phase of the case, the court below quite brushed aside what this Court had held in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596:

> "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. * * * the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements."

Significantly enough, the Joint Board award that the court below deemed "beyond understanding" (*infra*, p. A11) was one that two management members of the Joint

Board considered entirely feasible after they had personally visited the job site (Ex. 9, p. 56).

Whether a similar award made by the Labor Board in a Section 10(k) proceeding would have been unenforceable, as the court below intimated it would be (*infra*, p. A11), is of course quite irrelevant. The Section 10(k) remedy was adopted in preference to arbitration, see *Labor Board* v. *Radio Engineers*, 364 U.S. at 581-583; and, as the Chairman of the Joint Board testified (Ex. 9, pp. 6-7), the Labor Board's function under Section 10(k) is wholly different from that of the Joint Board under the collective bargaining agreements that provide for resort to its procedures.

Here the court below has pushed into view the asserted wrongs committed by the Carpenters while pushing out of view the palpable breach of contract committed by Montag. And, since that obviously unfair result was reached by substituting the court's judgment for that of the arbitrators selected by the parties, there is involved a disregard of this Court's decision in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593. Review is therefore imperative to redress the resultant divergence.

Third. The court below seems to have been mesmerized by the word "featherbedding," using it no less than six times apart from quotations (*infra*, pp. A6, A7 (twice), A8, A11 (twice)). But even if effectuating the Joint Board's award had required Montag to fill a few more jobs, a matter that rests on purest speculation inasmuch as Montag never even attempted compliance therewith, that circumstances would not constiute an unfair labor practice under § 8(b)(6) (*infra*, pp. A16, A17) as that provision has been construed here. *American Newspaper Publishers Ass'n* v. *Labor Board*, 345 U.S. 100; *Labor Board* v. *Gamble Enterprises*, 345 U.S. 117. Moreover, even full blown featherbedding clearly in violation of § 8(b)(6) would not support an action for damages under § 303(b); both the

acts enumerated under § 303(a)(4) as originally enacted (*infra*, p. A16) as well as those incorporated by reference in § 303(a) as later amended (*infra*, p. A19) do not include any of the matters condemned as unfair labor practices by § 8(b)(6).

In consequence of its preoccupation with the word "featherbedding" and of its use of that term as though the expression itself exuded self-generated evil, the court below has rendered what can only be deemed a decision by epithet. But that circumstance, though it probably explains the disregard below of controlling rulings here, falls far short of justifying, much less of supporting, the judgments now sought to be reviewed.

CONCLUSION

All three judgments below rest on a theory of law that would not support a finding of unfair labor practices by the Labor Board, while the judgment in the Montag case is additionally in square conflict with decisions here. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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